United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL BRIEF

No. 76-4256

76-4256

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

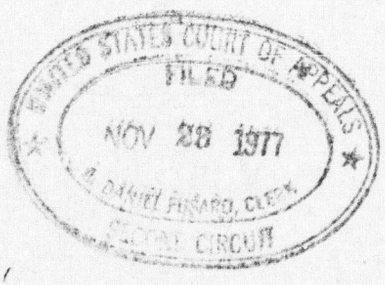
WALTER M. JANCZAK,
PETITIONER

V.

F. RAY MARSHALL,
SECRETARY OF LABOR,
RESPONDENT

Petition for Review of the Secretary of Labor's Determination Under Chapter 2, Title II of the Trade Act of 1974

SUPPLEMENTAL BRIEF FOR THE SECRETARY OF LABOR



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Chapter 2 of Title II of the Trade Act of 1974 (19 U.S.C. 2271 et seq.; Pub. L. 93-618; 88 Stat. 2019):

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INTRODUCTION

This Supplemental Brief for the Secretary of Labor is submitted pursuant to Civil Appeal Scheduling Order No. 4 in this action, and supplements the Brief for the Secretary of Labor filed August 9, 1977, pursuant to Civil Appeal Scheduling Order No. 3 in this action. This Supplemental Brief also responds to Petitioner's Second Brief (October 24, 1977) in this action.

Petitioner filed with this Court a petition under Section 250 of the Trade Act of 1974 (hereinafter referred

to as the Act) (19 U.S.C. 2322) for judicial review of Certification No. TA-W-884 (41 Fed. Reg. 42719; September 26, 1976), issued under section 223 of the Act (19 U.S.C. 2273), of eligibility of a group of workers to apply for adjustment assistance under Chapter 2 of Title II of the Act (19 U.S.C. 2271 et seq.).

This action is in reality a request to this Court to invalidate a benefit eligibility interpretation of section 247(2)(B) of the Act (19 U.S.C. 2319(2)(B)) made by the Secretary of Labor pursuant to his authority under section 248 of the Act (19 U.S.C. 2320) and his general authority as the official charged with the administration of this portion of the Act. On June 18, 1977, the Secretary of Labor submitted a Motion to Dismiss this action on the ground that this Court lacks jurisdiction over the issues in the action. A memorandum of points and authorities in support of the motion was submitted with the motion on that date. The Petitioner never responded to that motion or the memorandum in support thereof. This Court, on July 19, 1977, denied the motion without prejudice to renewal of the motion before the panel hearing the action. In the Brief for the Secretary of Labor, filed August 9, 1977, the Secretary of Labor renewed and reaffirmed his Motion to Dismiss at page 16, and does so again at this time. The Petitioner has not yet responded to the renewed Motion to Dismiss.

ARGUMENT

I

THIS COURT LACKS JURISDICTION OVER ISSUES OF THIS ACTION

As this Court stated in Bethlehem Steel Corporation v. Environmental Agency, 538 F.2d 513 (2d Cir. 1976):

> . . . [I]t seems to us that when a jurisdictional statute sets forth with such specificity the actions of an administrative agency which may be reviewed in the courts of appeals, a litigant seeking such review of an action that is not specified bears a particularly heavy burden. [538 F.2d at 518.]

Section 250 of the Act (19 U.S.C. 2322) provides for judicial review of certification determinations made by the Secretary of Labor under section 223 of the Act (19 U.S.C. 2273). Since the bump interpretation of section 247(2)(B) (19 U.S.C. 2319(2)(B)) is outside the scope of section 250 review for the reasons set forth above and in the Brief for the Secretary of Labor, the Petition for Review in this action should be dismissed. American Federation of Labor v. National Labor Relations Board, 308 U.S. 401, 404 (1940); Bethlehem Steel Corporation v. Environmental Protection Agency, supra, 538 F.2d at 418; Brief for the Secretary of Labor at 16-20. If the Petitioner or any other worker believes that he or she is qualified to receive worker adjustment assistance under the Act, application must be made to the applicable State agency under section 239 of the Act (19 U.S.C. 2311) or, if appropriate, to the Secretary of Labor under section 240 of the Act (19 U.S.C. 2312). Appeal must be taken through the administrative and judicial

processes consistent with the provisions of sections 234, 239, and 240 of the Act (19 U.S.C. 2294, 2311, and 2312).

II

THE ADMITTED FACTS FAIL TO SUPPORT PETITIONER'S LEGAL ARGUMENT

As stated in the Brief for the Secretary of Labor, after a certification has been granted to a group of workers to apply for worker adjustment assistance, if an individual in the group certified as adversely affected by foreign imports is laid off, and exercises a seniority right and displaces ("bumps") an employee from a job outside the certified group, the second worker (the "bumpee") may apply for worker adjustment assistance. Brief for the Secretary of Labor at 17. There is a requirement, which the Petitioner is challenging, that there be an unbroken causal connection between the lay off of the first worker and the bumping of the second worker. If there is a break in time between the first worker's lay off and the bump, the second worker may not apply for worker adjustment assistance. 1/

1/ The Secretary of Labor's bump interpretation has been applied consistently under the Act and under the predecessor Trade Expansion Act of 1962 (19 U.S.C. 1801 et seq. (1970 ed.)). Section 338(2) of the earlier Act (19 U.S.C. 1978(2) (1970 ed.)) defines "adversely affected worker" in the same language as section 247(2) of the present Act (19 U.S.C. 2319(2)). Under the earlier Act benefit appeals went to the Assistant Secretary for Manpower. 29 CFR 91.28(c) (1973). In Anna M. Bokory, 73-TRA-26 (May 2, 1973), the Assistant Secretary determined that the claimant-bumpee was not qualified for adjustment assistance since the bumper "had not worked in the . . . [adversely affected division] immediately before the replacement. Only if the replacement resulted

As such, the bump interpretation relates to the qualifications of individual workers to receive worker adjustment assistance (19 U.S.C. 2291) and not to the certification of a group of workers to apply for worker adjustment assistance (19 U.S.C. 2273).

Petitioner's Second Brief discusses the alleged effect of the Secretary of Labor's bump interpretation on sixteen individuals at the Bethlehem Steel Corporation, Lackawanna, New York plant. Petitioner's Second Brief at 7. Eight of the individuals were alleged bumpers and the remaining eight were allegedly the individuals that were bumped. The allegation of facts with regard to the claims of specific individuals for benefits shows that the Petitioner is arguing for the receipt of benefits under Subchapter B of Chapter 2 of Title II of the Act and not for a certification under section 223. See jurisdiction argument above.

An examination of the administrative record filed in this action and the appendices to Petitioner's two briefs fails to disclose any documentary information supporting Petitioner's alleged facts relating to these sixteen individuals. Petitioner's facts alleged from the second line on page 7 of his Petitioner's Second Brief through the end of

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FN cont'd

in her total separation and had been by a worker directly from . . . [the adversely affected division] would she have been an affected worker." Id. at 2. A copy of Anna M. Bokory is attached as Appendix A hereto and made a part hereof.

the Statement of Facts in that Brief should be disregarded by this Court. Statements in court of appeals briefs based on information not a part of the record below are disapproved of. Sigurdson v. Del Guercio, 241 F.2d 480, 483 (9th Cir. 1954). Further, inclusion of such material in an appellate brief is grounds for striking the offending matter, Johnson v. United States, 426 F.2d 651, 656 (D.C. Cir. 1970), cert. dismissed, 400 U.S. 940.

Even if it were proper for this Court to consider the facts alleged by Petitioner with regard to alleged claims of specific individuals, the Court should note discrepancies in the facts alleged by Petitioner between his two briefs and within his second brief. In the Petitioner's First Brief (December 30, 1976), he states that bumpees to whom the bump interpretation allegedly does harm were bumped by workers who had been on lay off for twenty-six weeks. Petitioner's First Brief at 2. In Petitioner's Second Brief, the Petitioner states that some employees are laid off, take vacation time, and then bump other employees, while other employees are laid off and may not exercise bumping rights until six months have passed. Petitioner's Second Brief at 12.

Examination of the facts alleged on page 7 of the Petitioner's Second Brief show that the alleged bumpers were laid off on August 2, 1975, and exercised their bumping rights after only slightly more than two months later.

Petitioner does not state in what status the bumpers were placed during the two months. If the bumpers were not in work status during the two months, clearly the bumpers would be the adversely affected workers and be entitled (if otherwise qualified) to receive worker adjustment assistance. In no event could a bumper and the worker that individual bumped both be eligible to receive worker adjustment assistance. The Statement of Facts in Petitioner's Second Brief fails to show if any of the bumpers or bumpees applied to the applicable State unemployment compensation agency for worker adjustment assistance, or if they received or were denied such assistance.

CONCLUSIONS

For the reasons set forth above and in the Brief for the Secretary of Labor, the Motion to Dismiss, and the memorandum in support of the Motion to Dismiss, this Court should dismiss the Petition for Review in this Action.

Respectfully submitted,

CARIN ANN CLAUSS,
Solicitor of Labor,

NATHANIEL BACCUS III,
Associate Solicitor for
Employment and Training

JONATHAN H. WAXMAN,
BRUCE W. ALTER,
Attorneys,

U. S. Department of Labor
Washington, D. C. 20210

CERTIFICATE OF SERVICE

I hereby certify that copies of this Supplemental Brief for the Secretary of Labor were mailed this 21st day of November, 1977, to Thomas P. McMahon, Esq., Attorney for Petitioner, 1028 Liberty Bank Building, Buffalo, New York 14202.

Bruce W. Alter

BRUCE W. ALTER
Attorney

APPENDIX A

Anna M. Bokory,
Decision No. 73-TRA-26
(May 2, 1973)

U.S. DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR
MANPOWER
WASHINGTON, D.C. 20210

IN THE MATTER OF THE APPLICATION FOR TRADE READJUSTMENT ALLOWANCES OF Anna M. Bokory SSN 311-05-6806 3563 South Langley Drive South Bend, Indiana 46614	)	Decision No. 73-TRA-26 Indiana Board of Review Case No. 72-TRA-1

The petition for review filed by Anna M. Bokory, an applicant for Trade Readjustment Allowances (TRA) under Title III, Chapter 3 of the Trade Expansion Act of 1962, 19 USC 1931 et seq. (the Act), comes before me for decision pursuant to delegation of authority by the Secretary of Labor (Secretary's Orders 20-71 and 21-71, dated August 13, 1971). The petition was timely filed under the applicable regulation of the Secretary (29 Code of Federal Regulations (CFR) 91.28(c)).

The issue presented by the petition is whether the petitioner was an adversely affected worker under section 338(2) of the Act as implemented by 29 CFR 91.1(c).

A trade readjustment allowance is payable to an adversely affected worker for a week of unemployment under specified conditions. An "adversely affected worker" is an individual who, because of lack of work in an adversely affected employment, has been totally or partially separated from such employment or has been totally separated from employment with a firm in a subdivision of which adversely affected employment exists. "Adversely affected employment" means employment in a firm or appropriate subdivision of a firm, if workers of such firm or subdivision are eligible to apply for adjustment assistance under the Act. (Section 338(1) and (2) of the Act; 29 CFR 91.1(b) and (c)). Stated in other words, to be entitled to trade readjustment allowances, it must be shown that, because of a lack of work in a division or department of the employer's plant whose workers have been determined to be eligible to apply for adjustment assistance, petitioner has been separated (totally or partially) from employment in that division or department; or if she was not working in such division or department when separated, that she has been displaced, that is, "bumped" out of her job by an employee who, because of lack of work in such a division or department, lost his job therein.

On December 2, 1970, the U.S. Department of Labor issued a certification that the salaried, production, and maintenance workers of the employer's plant who became unemployed or underemployed after April 21, 1968, because of the phase out of production of canvas-rubber footwear at that plant were eligible to apply for adjustment assistance under the Act. The subdivision of the plant engaged in the production of canvas-rubber footwear is the only subdivision thereof whose workers have been certified to be eligible to apply for adjustment assistance under the Act, and therefore it is the only subdivision in which employment constituted "adversely affected employment" within the meaning of section 338(1) of the Act.

Petitioner worked in the canvas shoe department for two months in 1959 (from January 20 through March 30), long before the impact date, April 21, 1968. In 1970, the year of her separation, she was working in the foam finishing department, where she had worked at various times since 1963. She contends that at the end of January 1970, she was replaced, that is, bumped, as a result of another employee losing her job in the canvas shoe department. However, the evidence does not support this contention. She was replaced by a worker who had worked in the canvas footwear division but had not worked in the canvas division immediately before the replacement. Only if the replacement resulted in her total separation and had been by a worker directly from canvas would she have been an affected worker.

After a period of sick leave in January and February 1970, the petitioner returned to work on March 17 for five weeks. Thereafter, in May she was recalled to work in the foam finishing department, where she worked until September, when she applied for and was granted early retirement, effective September 18, 1970. The only division in which there was adversely affected employment was the canvas footwear division. The petitioner was not separated from that division. Moreover, petitioner accepted early retirement and was not separated for lack of work. As stated in the Report of the House Committee on Ways and Means, House Report No. 1818 at page 29, a worker who voluntarily left his job would not be eligible for TRA no matter how good the cause. The separation must be for lack of work in adversely affected employment. Accordingly, the petitioner is not an adversely affected worker and is not eligible for TRA.

DECISION: The decision of the Indiana Review Board is affirmed.

[redacted] Assistant Secretary for Manpower

MAY 2 1973

DATE

U.S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20210

NOV 21 [redacted]

11/23

Honorable Daniel Fusaro
Clerk
United States Court of Appeals
for the Second Circuit
Foley Square
New York, New York 10007

Re: Walter M. Janczak v. F. Ray Marshall, Secretary of Labor, No. 76-4256

Dear Mr. Fusaro:

Enclosed please find ten copies of the Supplemental Brief for the Secretary of Labor filed pursuant to Scheduling Order No. 4 in this action. Two copies have been mailed this date, postage prepaid, to the Petitioner's attorney.

Sincerely,

NATHANIEL BACCUS III
Associate Solicitor for
Employment and Training

Enclosures

cc: Thomas P. McMahon, Esq.
Attorney for Petitioner